

GLADYS REYES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DEPARTMENT OF THE ARMY)	DATE ISSUED: <u>Nov. 29, 2001</u>
)	
and)	
)	
RSKCo (formerly ALEXIS))	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Ralph R. Loberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Christopher P. Boyd and Bonnie J. Murdoch (Taylor, Day & Currie), Jacksonville, Florida, for employer/carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (98-LHC-1028) of Administrative Law Judge John C. Holmes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. Claimant, a childcare worker, suffered a back injury while pushing an evacuation crib during the course of her employment at Fort Carson in Colorado Springs, Colorado, on December 10, 1993. In January 1996, claimant accompanied her husband to Fort Stewart in Hinesville, Georgia. Employer voluntarily paid various periods of temporary total disability benefits through October 2, 1996, the date on which claimant reached

maximum medical improvement. Claimant filed a claim for continuing total disability benefits.

In his initial Decision and Order, the administrative law judge found that although it is undisputed that claimant is unable to perform her usual employment, employer established the availability of suitable alternate employment, and claimant failed to demonstrate that she exercised diligence in pursuing post-injury employment opportunities. The administrative law judge therefore awarded claimant temporary total disability compensation from December 14, 1993, through June 26, 1996, the date of employer's labor market survey, temporary partial disability compensation from July 27, 1996 through October 2, 1996, and permanent partial disability compensation thereafter, based on a loss of wage-earning capacity of \$34.10 per week. The administrative law judge also awarded claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907. On claimant's appeal, the Board affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment. The Board remanded the case, however, for the administrative law judge to address all evidence relevant to the determination of whether claimant diligently sought post-injury employment. *Reyes v. Department of the Army*, BRB No. 99-0911 (May 26, 2000)(unpub.).

On remand, the administrative law judge determined that claimant diligently sought work in Hinesville, but that claimant's decision to limit her search to Hinesville has no basis in the record. The administrative law judge found that claimant did not diligently seek work in the larger communities of Jessup and Savannah, and accordingly, claimant's claim for continuing total disability benefits was denied. The administrative law judge reinstated his initial award.

On appeal, claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment, and that claimant did not produce evidence to rebut this finding. Employer responds, urging affirmance.

Claimant initially challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. The Board, in its previous decision, specifically affirmed the administrative law judge's finding that employer established suitable alternate employment through its identification of available positions as a tutor, crossing guard, pharmacy technician, and restaurant hostess, based on the testimony of vocational expert, Ms. Arnold, who considered claimant's background and restrictions and obtained the approval of claimant's doctor, Dr. Novak. We decline to reconsider our previous holding that employer established suitable alternate employment, as it constitutes the law of the case. *See Reyes*, slip op. at 2-3; *see Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

Next, claimant contends that the administrative law judge erred in requiring that she seek alternate work outside of Hinesville. If employer establishes the availability of suitable alternate employment, claimant can rebut that showing and retain entitlement to total disability benefits by demonstrating that, despite a diligent effort, she was unable to secure suitable employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). The inquiry into claimant's diligence in seeking post-injury employment is not limited to the actual jobs identified by employer, but encompasses

employment opportunities of the type shown by employer to be suitable and available. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998).

The administrative law judge found that although claimant was diligent in her job search in Hinesville, this community is small and does not represent a reasonable search area in this case. The administrative law judge found that claimant failed to establish that she sought work in Jessup, which is 15 to 20 miles from Hinesville, or in Savannah, which is approximately 40 miles from Hinesville. Claimant does not dispute she did not seek work in those areas, but maintains it is *per se* unreasonable to require her to seek work in areas not proximate to her residence. We reject claimant's contention. The administrative law judge properly inquired as to the nature and sufficiency of claimant's job search. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see also CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). In this case, it is claimant's burden to establish that she diligently sought suitable work, but was unable to obtain such employment. *See Berezin v. Cascade General, Inc.*, 34 BRBS 162 (2000). The administrative law judge stated that claimant's job search must encompass an area that is a realistic and reasonable distance from her residence. He found reasonable both the approximately 15 to 20 mile commute each way to Jessup and the longer 40 mile commute each way to Savannah, as he found that claimant did not establish that she cannot physically make such trips. Decision and Order on Remand at 4. In this regard, the administrative law judge found that claimant owned and drove a van on errands with the approval of Dr. Hall and that there is no indication in the record that her medications affect her ability to drive safely or operate equipment. This finding is supported by substantial evidence. The administrative law judge additionally found that claimant inquired about the tutor position identified by employer at Sylvan Learning Center in Savannah, thereby acknowledging that Savannah is within a reasonable commuting distance. Based on the facts in this case, the administrative law judge rationally found that claimant was required to establish a diligent job search in larger communities within a reasonable commuting distance from Hinesville. *Cf. Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001). As the administrative law judge's findings are rational and supported by substantial evidence, they are affirmed. Thus, as claimant did not establish that she engaged in a diligent job search, the administrative law judge properly denied total disability benefits.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge